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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS,
Appellant,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

This motion of Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42, consent to the filing of a brief having been granted by counsel for Appellant Burns but denied by counsel for Appellee Alcala.

Pacific Legal Foundation is a nonprofit tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the eighteen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation is gravely concerned by the action of the court below in overturning a state welfare policy on a rationale which ignores the controlling precedents established by this Court in *Roe v. Wade*, 410 U.S. 113 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); and *Dandridge v. Williams*, 397 U.S. 471 (1970), among others.

Pacific Legal Foundation considers that this case is of special significance in that it raises fundamental questions concerning the propensity of some lower courts to mandate upon the states expanded interpretations of welfare eligibility. Pacific Legal Foundation appears here because of its conviction that the courts should not levy upon states welfare expenses not mandated by Congress.

Pacific Legal Foundation believes that the magnitude of this issue was not fully developed in the Court of Appeals and doubts that the parties will fully address this aspect of the case in the present proceedings.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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November 1974.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The United States Court of Appeals for the Eighth Circuit, in an opinion reported at 494 F.2d 743 (1974), affirmed an injunction requiring the State of Iowa to grant Aid to Families with Dependent Children (AFDC) to fetuses, holding that the term "dependent child" as used in §406(a) of the Social Security Act, 42 U.S.C.A. §606(a), is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act.

ARGUMENT

I

CONGRESS HAS NEVER CONSIDERED A FETUS TO BE A CHILD IN ANY OF ITS STATUTORY PROGRAMS

The issue presented by this case is whether a fetus is a "dependent child" within the meaning of §406(a) of the Social Security Act, 42 U.S.C.A. §606(a), and consequently entitled to receive Aid to Families with Dependent Children [AFDC]. As noted by the Court of Appeals, as of 1971, 18 jurisdictions provided AFDC benefits to fetuses while 34 jurisdictions did not. *Alcala v. Burns,* 494 F.2d 743, 745.

Congress has created numerous programs to provide benefits to or on behalf of children. Not one of these programs, however, provides any benefits to other than born children. This may well be because, as implicitly recognized by this Court in *Roe v. Wade,* 410 U.S. 113 (1973), the needs of the unborn cannot be considered separately from the needs of the expectant mother. Thus, in Title V of the Social Security Act—Maternal and Child Health and Crippled Children's Services—§508(a), 42 U.S.C.A. §708(a) provides for grants to state health agencies for the provision of "necessary health care to prospective mothers (including, *after childbirth,* health care to mothers and their infants). . . . " [emphasis added]. The language of this program demonstrates that Congress was aware of the distinction between children and fetuses. Aid to the infant does not commence until "after childbirth", before birth, the aid is characterized not as going to the fetus but rather to the prospective mother.

To similar effect, Congress has appropriated 40 million dollars for fiscal year 1975 to provide a special supplemental food program to pregnant or lactating women and to infants. 42 U.S.C.A. §1786. As in Title V, Congress has provided assistance not to the fetus, but to the pregnant woman and after birth of the child, to both the mother and the infant.

In establishing a program to benefit victims of black lung disease, Congress made the rate of payment dependent upon the number of children of the victim. (30 U.S.C.A. §922(a)(3).) Although Congress has not specified whether this payment rate included fetuses, it has never been contended that the program was intended to include the unborn in this consideration.

Congress has made birth a major operative factor in obtaining the benefits of citizenship. Thus, pursuant to 8 U.S.C.A. §1401(a), citizenship may be established by being born in the United States and subject

to the jurisdiction thereof, even if the subject's parents are not citizens. Under this provision, the status of being a fetus in the United States establishes no rights of citizenship. One could be carried in the womb in the United States by a Canadian mother for the full term less one day, but if the mother is visiting Canada on the date of birth, the child is not a United States citizen. Congress has accorded the status of the fetus no accrued rights; only the fact and place of birth may be considered.

In *Wyman v. James*, 400 U.S. 309, 324 (1971), this Court drew the analogy between the Social Security Act and the Internal Revenue Code in the situation of noncooperative welfare recipients and taxpayers. The analogy is similarly apt in the case of fetuses.

The Internal Revenue Code provides an "exemption of $750.00 for each dependent (as defined in section 152) . . . who is a child of the taxpayer. . . . " 26 U.S.C.A. §151. That such exemptions include only born children is demonstrated by the referenced section 152. That section provides in part that:

> "The term 'dependent' does not include any individual who is not a citizen or national of the United States unless such individual is a resident of the United States, of a country contiguous to the United States, of the Canal Zone or of the Republic of Panama. The preceding sentence shall not exclude from the definition of 'dependent' any child of the taxpayer—
>
> "(A) born to him, or legally adopted by him, in the Philippine Islands before January 1, 1956 . . . . " 26 U.S.C.A. §152(b)(3).

As noted heretofore, pursuant to 8 U.S.C.A. §1401, birth is a prerequisite to determination of citizenship. This is re-emphasized by Congress in its reference in 26 U.S.C.A. §152(b)(3)(A) to children "born . . . or legally adopted. . . . " As in the rest of its statutory programs, Congress has restricted the benefits of tax exemptions to children who have been born.

This Court noted in *Roe v. Wade*, 410 U.S. 113, 157, n. 53, that it was not aware that Congress had ever authorized counting of fetuses in the taking of the census, although the Constitution requires the enumeration of "persons" which would include children. U.S. Const., Art. I §2, cl. 3.

Title II of the Social Security Act (Old Age Survivors, and Disability Insurance Benefits) also restricts benefits to born children. Section 202(d)(8), 42 U.S.C.A. §402(d)(8), provides in part:

> "In the case of a child who was *born* in the one year period during which such child *must have been living* with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child *has lived* with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the *date of birth* of such child." (Emphasis added.)

This provision makes clear the intent that eligibility for Title II benefits is not only restricted to living children but is directly tied to the date of birth of the child. *Amicus curiae*, Pacific Legal Foundation,

is aware of no federal statute which includes a fetus within the definition of the term child.

II

CONGRESS DID NOT INTEND THE TERM "DEPENDENT CHILD" TO INCLUDE A FETUS FOR PURPOSES OF AFDC

As noted in *Wisdom v. Norton*, ... F.2d ..... (2d Cir. Doc. No. 74-1402, October 11, 1974) the practice of the Department of Health, Education and Welfare (HEW) allowing AFDC payments on behalf of fetuses "originated as an *ad hoc* decision to defer to a state's policy, rather than as a rule based on an interpretation of the federal statute." Mem. Dec. 5687, n. 36. The State of Wisconsin had provided payments on behalf of fetuses under a state program antedating the Social Security Act. The extension of this practice to the federal program was made the subject of an audit exception. Upon consideration, the Social Security Board specifically declined to enunciate a formal policy, but directed that the Wisconsin audit exception be waived. *Parks v. Harden*, 354 F. Supp. 620, 625, n. 5 (N.D. Ga. 1973). Since §1104 (42 U.S.C.A. §1304) provides that "the right to alter, amend, or repeal any provision of this Act is reserved to Congress", such administrative expansion of the act was completely improper.

In concluding that "AFDC statutory provisions do not permit, much less authorize, payments to the unborn", *Wisdom v. Norton, supra*, Mem. Dec. 5690, the Second Circuit noted the legislative history of

Title IV. That court cited the Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong. 1st Sess. 30 (1935), which declared:

> "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." Mem. Dec. 5682-5683.

Since one cannot provide aid to the fetus without aiding the prospective mother, this statement indicates the intent of Title IV to aid only born children.

The section (406(a)) of the Social Security Act in issue states that "the term 'dependent child' means a needy child . . . who is living. . . ." 42 U.S.C.A. §606(a). As noted by this Court in *Roe v. Wade*, 410 U.S. 113, 161:

> "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth. . . ."

Since Congress has restricted the definition of the term "child" to one who is "living", eligibility for AFDC is dependent upon live birth.

In *Mixon v. Keller*, 372 F. Supp. 51, 54 (M.D. Fla. 1974), *cert. denied*, ... U.S. ....., 43 L.W. 3213, the court, in rejecting fetal eligibility for AFDC, quoted

approvingly the language of *Parks v. Harden, supra,* at 623-624:

> "As a matter of semantics, there is simply no way to conclude that the word 'child' includes something else which is not a 'child', namely an unborn child. In legal terms, the unborn child is normally referred to as a fetus, or 'quick', or *in utero* and the court knows of no cases which confer a legal right on an unborn child as such, . . ."

The *Mixon* court went on to note:

> "The plaintiff's own expert, a recognized authority in the field of pre-natal medicine and pediatrics, testified that fetuses are never referred to medically or clinically as children, unborn or otherwise; . . . .
>
> . . . .
>
> "Certainly those members of Congress responsible for the drafting and passage of this legislation were not so naive, unversed or shortsighted in medical terminology to ignore or omit the term 'fetus' where it is alleged they specifically intended to include the same." *Mixon, supra,* at 54.

In explaining the provisions of the Social Security Act, prior to its enactment, Representative Ellenbogen addressed a joint session of the 74th Congress on May 20, 1935:

> "In our modern society, social security in its true sense means the enactment of laws that will safeguard the fundamentals of life to every human being from the *time of birth* until the time of death. . . .

> "The child-welfare laws and public-health measures which we pass should protect the child from the *day of his birth* until he reaches maturity." Cong. Rec., vol. 79, p. 7838 (emphasis added).

Mr. Ellenbogen in a subsequent address on the Social Security Act as it affected dependent children, re-emphasized the scope of coverage:

> "The idea will be security of the individual from birth to death." Cong. Rec., vol. 79, p. 13,678.

Section 402(a)(17), 42 U.S.C.A. §602(a)(17), requires states to undertake "in the case of a child *born* out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him. . . ." (Emphasis added.) This section clearly contemplates providing aid only in the case of born children.

In the 1972 amendments to the Social Security Act, Congress required HEW to take affirmative measures to assure that social security account numbers, to the maximum extent practicable, be assigned to appropriate groups including "any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person; . . . ." §205(c)(2)(B)(i)(II), 42 U.S.C.A. §405(c)(2)(B)(i)(II). The amendments further mandate HEW to "require of applicants for social security account numbers such evidence as may be necessary to establish the age, citizenship, or alien status, and true identity of such

applicants, and to determine which (if any) social security account number has previously been assigned to such individual." §205(c)(2)(B)(ii), 42 U.S.C.A. §405(c)(2)(B)(ii).

In requiring the assignment of social security account numbers to any child on whose behalf public assistance benefits are claimed, it stretches credulity beyond the breaking point to contend that Congress intended that social security account numbers be assigned to fetuses. Such intent is particularly improbable in view of the complementary requirement. It is obvious that the evidence necessary to establish age, citizenship or alien status and the true identity of any applicant may be adduced only upon birth.

Section 402(b) of the Act, 42 U.S.C.A. §602(b), similarly clarifies the congressional intent to provide aid only after birth. That section prohibits HEW from approving any state plan which imposes a residence requirement which denies aid to any child "who was *born* within one year immediately preceding the application. . . ." (Emphasis added.)

The intent of Congress to exclude fetuses from AFDC eligibility is further demonstrated by the fact that Title IV as originally enacted provided only for aid to children and did not include aid to caretaker relatives. C. 531, Title IV, §406, 49 Stat. 629. See *Parks v. Harden,* 354 F. Supp. 620, 624 (N.D. Ga. 1973).

It would seem to be a physiological impossibility to provide any kind of aid to a fetus without providing that aid to and through the prospective mother.

The structure of the statutory scheme providing aid to children makes for a case even stronger than *Roe v. Wade,* where this Court declared:

> "But in nearly all these instances the use of the word [person] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application." 410 U.S. 113, 157.

Every application of the term "child" in federal statutes has logical application only to born children.

III

A FETUS IS NOT AN INDIVIDUAL AS CONTEMPLATED BY §402(a)(10)

In ordering the State of Iowa to provide AFDC to fetuses, the Court of Appeals relied principally on §402(a)(10), 42 U.S.C.A. §602(a)(10), which requires that AFDC "be furnished . . . to all eligible individuals. . . ." *Alcala v. Burns,* 494 F.2d 743, 745. Citing *Townsend v. Swank,* 404 U.S. 282, 286 (1971), *King v. Smith,* 392 U.S. 309 (1968), and *Carleson v. Remillard* 406 U.S. 598 (1972), the Court of Appeals stated that if those "cases are to govern, it must first be determined that unborn children are 'eligible'. . . ." *Id.*

That court unfortunately overlooked the other half of the §402(a)(10) equation. That section in referring to "eligible individuals" also requires a determination that fetuses are "individuals." In *Roe v. Wade,* this Court noted that the "pregnant woman cannot be

isolated in her privacy" 410 U.S. 113, 159. Neither, of course, can the fetus be isolated as an individual, separate and distinct and from the pregnant woman upon whom it is totally dependent. Neither the ordinary usage of the English language nor any other language of the Social Security Act suggests that the term "individual" would include a fetus. If a fetus is not a "person" within the meaning of the Constitution (*Roe v. Wade, supra,* at 157-158), it is surely not an individual within the meaning of §402(a)(10).

Further, the Court of Appeals' reliance on the *Townsend* Trilogy in its interpretation of §402(a)(10) was clearly misplaced. This section was interpreted in *Jefferson v. Hackney,* 406 U.S. 535, 544-545 (1972), with particular care given to limitation of the scope of the *Townsend* doctrine:

> "That section was enacted at a time when persons whom the State had determined to be eligible for the payment of benefits were placed on waiting lists, because of the shortage of state funds. The statute was intended to prevent the States from denying benefits, even temporarily, to a person who has been found fully qualified for aid. [Citation omitted.] Section 402(a)(10) also forbids a State from creating certain exceptions to standards specifically enunciated in the federal act. See e.g., *Townsend v. Swank,* 404 U.S. 282 (1971). It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of need, income, and benefits. [Footnote omitted.] Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellant's invitation to change this longstanding statutory scheme simply for policy reasons of which we are not the arbiter." *Accord, New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 421 (1973).

This Court in *Jefferson* read Section 402(a)(10) as barring states from creating certain exceptions to *specific* standards in the Act. In *Townsend, supra,* the issue was an Illinois statute which denied AFDC eligibility to children aged 18 through 20 who were in college. This was in direct conflict with Section 406(a)(2)(B) of the Act which specified eligibility for a child under age 21 who was a "student regularly attending a school, college, or university." In the case at hand, however, there is no provision in the Act which similarly specifies eligibility for fetuses. On the contrary, everything in the Act and other federal law indicates an intent not to provide such eligibility.

IV

CONSIDERATIONS OF SOCIAL POLICY ARE MORE PROPERLY LEFT TO CONGRESS

The basis of the Court of Appeals' decision appears to be that "the term 'dependent child' is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act." 494 F.2d at 746.

In effect, the court reaches this conclusion on the basis of two assumptions. First, that a fetus is

eligible for AFDC and secondly, that the *Townsend* Trilogy, therefore, requires provision of AFDC to fetuses. Nothing in the way of evidence, however, is offered to support the initial assumption of fetal eligibility. Unfortunately, this seems to be a common hazard in these series of cases.

The cases interpreting the Social Security Act as not including aid to the unborn cite a wealth of specific legislative history, case law, and conplementary provisions of the Act. *Wisdom v. Norton,* ..... F.2d ..... (2d Cir. Doc. No. 74-1402, 1974); *Mixon v. Keller,* 372 F. Supp. 51 (M.D. Fla. 1974), *cert. denied,* ..... U.S. ....., 43 L.W. 3213; *Parks v. Harden,* 354 F. Supp. 620 (N.D. Ga. 1973); *Poole v. Endsley,* 371 F. Supp. 1379 (N.D. Fla. 1974). The cases interpreting the Act as requiring payment of AFDC to the unborn, cited by the Court of Appeals, 494 F.2d at 745, rely on generalities. Perhaps the most dramatic illustration of this dichotomy is demonstrated in *Wilson v. Weaver,* 499 F.2d 155 (7th Cir. 1974). The majority decided that inclusion of fetuses was warranted by the Act's policy of "encouraging the care of dependent children." 499 F.2d at 158.[1]

This may be compared with the dissent of Circuit Judge Pell who came to the opposite conclusion only after a scholarly analysis of common law, legislative

[1]The referenced policy, in §401, read in more complete context, refers to "encouraging the care of dependent children . . . by enabling each State to furnish financial assistance . . . to needy dependent children and the parent or relatives with whom they are *living*. . . ." 42 U.S.C.A. §601. (Emphasis added.) Thus, the policy relied on by the majority by its own terms applies only to living children.

history, supporting provisions of Title IV, and the *Townsend* Trilogy. The rationale in the case at bench appears to rest less on what the Act actually says than on what that court would prefer it to say. Unable to muster supporting authorities for either side, the Court of Appeals adopts the result that is most congenial to its social philosophy.

In a decision reversing the lower court's voiding of the Maryland method of limiting the amount of AFDC grants to large families, this Court declared:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

Whether or not the consistent policy of Congress in refusing to recognize fetuses as children, eligible in their own right to qualify for public benefits, be they citizenship, tax exemption or welfare, is the most wise, just and humane social and economic policy devisable, should not be the basis for decision. The expansion of benefits to fetuses in this case would of course be a precedent for judicial expansion of benefits to fetuses in every other federal program.

The weighing of the positive and negative factors in this type of program is far better suited to the extended consideration present in the legislative process than to the crowded caseload atmosphere of the courts.

CONCLUSION

The Court of Appeals has failed to take into consideration the strong congressional policy of declining to recognize fetuses as children. To let this decision stand will be an invitation to other courts to create new social and economic policies without the benefit of the normal balancing factors inherent in the legislative process. For this reason, Pacific Legal Foundation, as *amicus curiae,* urges that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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November 1974